The trial court in it's instructions to the jury on Count IV of the indictment, first stated the offense in terms of the indictment (Tr. 879), and then told the jury in very general terms that violation 18 U.S.C. Sec. 2314 covered (Tr. 879-880). The trial court then proceeded to fully and specifically describe, define and explain the offense charged in the indictment, but continued to omit altogether the indispensible element of value of $5,000.00 or more required under 18 U.S.C., Sec. 2314 as follows: (Tr. 880)

> "The essential elements required to be proved of the offense charged in Count IV of the indictment are: first: That the draft or check referred to in said indictment was obtained by fraud;
>
> second: That said draft was transported in interstate commerce as charged in the indictment; and
>
> third: That the transportation of such draft or check in interstate commerce was willfully done and with knowledge that the draft had been taken by fraud. The offense, then, is complete upon completion of those elements. In other words, the offense becomes complete when a person transports from one state to another a check or a draft—bank draft—knowing that said bank draft or check had been obtained by fraud. It is not necessary to determine who may have obtained the bank draft by fraud. As stated before, the burden is on the prosecution to prove beyond all reasonable doubt every essential element of the crime charged."

The Court further, by way of recapitulation, says (Tr. pgs. 886, 887) as follows:

> "Now, as to Count IV of the indictment, if you find to your satisfaction beyond a reasonable doubt, that

the bank draft referred to in Count IV of the Indictment was obtained by fraud;
and you further find to your satisfaction beyond a reasonable doubt that said bank draft after being so obtained by fraud was transported in interstate commerce, that is, from Fort Worth, Texas, or a point in Texas, to Alexandria, Louisiana; and
you further find to your satisfaction beyond—
and it was so transferred to by the Defendant, Bergman; and you further find to your satisfaction beyond a reasonable doubt that the Defendant, Bergman willfully transported said draft in interstate commerce, knowing said draft to have been obtained by fraud, it will be your duty to find the Defendant Bergman guilty as charged in Count IV of the Indictment.

On the other hand, if you fail to so find to your satisfaction beyond a reasonable doubt, or have a reasonable doubt as to the existence of any one of those essential elements of that offense, it will be your duty to find the Defendant Bergman not guilty as charged in the Indictment."

The petitioner Bergman urged in the Court of Appeals that the trial court had committed reversible error in failing to require a finding on the part of the jury that the draft referred to in the Indictment must be proven to have been of the value of $5,000.00 or more.

The Court of Appeals held that there was no reversible error as the trial court's reference to the general provisions of 18 U.S.C. Sec. 2314, after stating the offense in terms of the indictment, constituted a sufficient instruction to the jury on that element of the offense. (Appendix B p. 21)

The petitioner Bergman also urged in the Court of Appeals that Count IV of the Indictment was fundi-

mentally defective in failing to allege the *value* of the draft alleged to have been stolen and transported in interstate commerce. The Indictment (Tr. 135-136) alleges that a draft *in the amount* of Seven Thousand Dollars was so transported.

The Court of Appeals did not see fit to write on this point; it was evidently prepared to judicially find that a draft in the *amount* of $7,000.00 is the *value* of $7,000.00 without resort to additional circumstances.

REASONS FOR GRANTING THE WRIT

1. As to the first question presented herein the decision of the Court below is in direct conflict with the decision of the Second Circuit Court of Appeals in *Tobo Busson Kaisha, Ltd. v. American President Lines, Ltd.*, 265 F.2d 418 (Appendix 6) which held that photostats prepared specifically for litigation and not made in the regular course of business were not admissible under 28 U.S.C., Sec. 1732, and such conflict must remain until settled by the Supreme Court.

2. The first question presented herein embodies a serious question of the correct interpretation of 28 U.S.C. 1732 which has not been, but should be settled by the Supreme Court. Settlement of this question is plainly in the public interest since it is likely to be presented in almost every trial where the offering party has prepared secondary evidence specifically for the purpose of litigation from business records and seeks to introduce this secondary evidence under 28 U.S.C., Sec. 1732, without producing the original records made in the course of business.

3. As to the first question presented herein, the decision of the Court below is believed to be erroneous and the conflicting decision of the Second Circuit Court of Appeals in *Tobin*, supra, correct.

The Court below held that the verifax copies prepared specifically for the purpose of this criminal prosecution were admissible under 28 U.S.C., 1732 (b) which provides:

> "... and an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of the Court." (Appendix A, p. 14)

and based its decision on the authority of *Williamson v. United States*, 272 F.2d 495 (C.A. 5, 1959), Cert. Den. 362 U.S. 920.

The facts of *Williamson*, supra, are plainly within 28 U.S.C. 1732 (b) as the Government carefully laid the predicate called for in the above quoted portion of the statute, at page 496-497 as follows:

> "Counsel for the United States stated that the originals were available for inspection and comparison by defendants' counsel; that he wished to substitute the copies for the originals which must be retained by the State of Georgia. The trial judge then inquired as to whether there was any objection to that procedure. Defense counsel stated that he had no objection."

However, in the case at bar, the Government laid no proper predicate for the introduction of the verifax copies and the originals were not available for inspection and com-

parison by defendant's counsel and the verifax copies were introduced over defendants' objections. Therefore, *Williamson*, supra, is not applicable to the case at bar, for as the Court said in *Tobo*, supra, (Appendix C, p. 34):

> "... while [redacted] (sic, photostats) are frequently substituted by consent of the parties where the original is available, that is quite another matter from receiving them, over objection, where the original is in Japan and no reason is given for not producing it. How could there be any guarantee that they are accurate reproductions of all that may be relevant." (Emphasis added)

The Court further stated:

> "... there are dangers of fraud and imposition in the use of photostats prepared specifically for trial and not made in the regular course of business."

It is clear that the burden of laying a proper predicate or foundation for the introduction of evidence under 28 *U.S.C.*, 1732 is on the offering party and it is believed that the decision of the Court below improperly shifts that burden to the petitioner even though he repeatedly objected to the introduction of this evidence which was prepared specifically for the purpose of the criminal prosecution and carried an inherent danger of fraud, imposition, and untrustworthiness.

Thus the conflicting decision in *Tobo*, supra, is believed a correct and proper construction of 28 *U.S.C.* 1732.

4. As to the second question presented herein the decision is believed to be erroneous and is at variance with

and in conflict with decisions of the other Circuits and probably conflicts with applicable decisions of this Court.

It is clear that in a criminal case the defendant is entitled to have the jury instructed on all the elements that must be proved to establish the crime charged, *Apex Distributing Co. v. United States*, 288 F.2d 796 Cert. Den. 368 U.S. 821, 82 S.Ct. 38, 7 L.Ed. 2d 26, and the trial court has the duty to instruct on all essential questions of law whether requested or not. *Screws v. U. S.*, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1995.

Some of the Circuit Court decisions in accord are *U.S. v. Guillian*, 288 F.2d 796, *Kelly v. U. S.*, 275 F.2d 10, *U. S. v. Noble*, 155 F.2d 315 and *U. S. v. Levy*, 153 F.2d 995.

In view of the trial court's charge as a whole, in which the "essential elements" of every count of the Indictment were carefully enumerated and recapitulated for the jury, it must surely be assumed that the jury relied on the trial judge's listing of the "esssential elements" and did not consider additional elements (i.e., the value of $5,000.00 or more) left out of the trial judge's listing and recapitulation of the "essential elements" required to be found by them.

The trial Court's holding below that the instructions to the jury reflected no *reversible error* deprived the petitioner of a jury finding on an essential and indispensible element of the offense charged.

5. As to the third question presented herein the decision of the Court below in affirming the conviction under Count IV of the Indictment convicts petitioner on a fundamentally defective Indictment.

The Indictment (Tr. 133-136) fails to allege the *value* of the draft alleged to have been transported in interstate commerce in violation of 18 *U.S.C.*, Sec. 2314, but rather alleges a draft *in the amount of* $7,000.00 was so transported.

Surely no court can be prepared to judicially find that a draft in the amount of $7,000.00 is of the value of $7,000.00 without resort to additional circumstances.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOE B. GOODWIN
Counsel for Petitioner

April 13, 1964

I hereby certify that a copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been served upon Hon. Wayne Justice, United States Attorney for the Eastern District of Texas, Tyler, Texas by depositing the same in the United States mail, properly stamped and addressed.

Joe B. Goodwin

APPENDIX A

28 U.S.C. 1732.

§ 1732. Record made in regular course of business; photographic copies

(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term "business," as used in this section, includes business, profession, occupation, and calling of every kind.

(b) If any business, institution, member of a profession or calling, or any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence, or event, and in the regular course of business has caused any or all of the same to be recorded, copied, or reproduced by any photographic, photostatic, microfilm, micro-card, miniature photographic, or other process which accurately reproduces or forms a durable medium for so

reproducing the original, the original may be destroyed in the regular course of business unless its preservation is required by law. Such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not and an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement, or facsimile does not preclude admission of the original. This subsection shall not be construed to exclude from evidence any document or copy thereof which is otherwise admissible under the rules of evidence. As amended Aug. 28, 1951, c. 351, §§ 1, 3, 65 Stat. 206; Aug. 30, 1961, Pub. L. 87-183, 75 Stat. 413.

18 U.S.C. 2314:

§ 2314. *Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting*

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or conceal-

ment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security, or tax stamps, or any part thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country. As amended July 9, 1956, c. 519, 70 Stat. 507; Oct. 4, 1961, Pub. L. 87-371, § 2, 75 Stat. 802.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1963

No. 19,959

D. C. Docket No. 6608 Criminal

H. M. (MIKE) MYRICK and VERNON EVANS, BERGMEN, a/k/a Soll Evans, Sol Evans and Sonney Evans,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Eastern District of Texas

Before HUTCHESON and GEWIN, Circuit Judges, and HOOPER, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

December 18, 1963

Issued as Mandate:

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19950

H. M. (MIKE) MYRICK and VERNON EVANS BERGMAN, a/k/a Soll Evans and Sonny Evans,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Eastern District of Texas

---

(December 18, 1963.)

Before HUTCHESON and GEWIN, Circuit Judges, and HOOPER, District Judge.

HOOPER, District Judge: The appellants Vernon Evans Bergman (also known as Soll Evans, Sol Evans and Sonny Evans) and Henry Madison Myrick, (also known as Mike Myrick and Mike Mayer) were both found guilty under Counts Two and Three, and Bergman was found guilty under Count Four, of the indictment returned against him.

Count One, based on 15 U.S.C. § 77q(a) charged a scheme to defraud various persons in the offer and

sale of capital stock of Legal Security Life Insurance Company, capital stock of American Rare Metals Corporation, and of Motels Unlimited, Inc.

Count Two was based on 18 U.S.C. §1341, charging use of the mails to defraud, based upon the same factual allegations contained in Count One.

Count Four (upon which Bergman only was convicted) was based on 18 U.S.C. §2314 charging transportation in interstate commerce of a certain bank draft in the amount of $7,000.00.

The trial consumed approximately four days and the transcript of evidence contains some one thousand pages. It is not necessary for a consideration of the points of error relied upon to give a full discussion of the various charges against appellants and the evidence adduced to support the same. The evidence discloses that appellants were involved in a deliberate scheme to palm off on the public for a very substantial sum of money certain stocks which were of practically no value, that they used the mails in furtherance of this scheme, and that Bergman caused to be transported in interstate commerce the draft referred to, the same having been obtained by fraud. Some reference to the evidence will be made herein.

(1) The first point of error alleges "there is a material variance between the allegations and the proof in Count One of the indictment of such a nature as to affect the substantial rights of the appellant."

It is not necessary, of course, that the Government should have proved each of the charges contained in

the indictment, but only necessary that a sufficient number of the charges in each Count should be proven to constitute a violation of the statute relied upon. The question of variance will therefore be approached from that viewpoint.

The second point of error complains of a variance likewise as to Count Two of the indictment and, since the allegations of both Counts One and Two cover the same subject matter, after a careful study of the entire record, we find no material variance.

Included among those allegedly defrauded in both Counts One and Two are Mrs. Esther Holmes and her husband Priestly H. Holmes (deceased) at the time of the trial, and Mrs. Fannie Donald.

The indictment charges in Count One, paragraph one, that defendants did knowingly in the offer and sale of the capital stock of American Rare Metals employ a scheme to defraud. The same Count alleging in paragraph two that defendants did sell to Mr. and Mrs. Holmes a total of 1400 shares of said stock, obtaining $1,100.00 therefor, converted said money to their own use, and did not deliver any certificates to said purchasers. It was further alleged (paragraph 17(a)) that appellants represented "that the purchase of capital stock in American Rare Metals was a good, safe and sound investment, and that said stock would double in value by June, 1961." The indictment alleged (paragraph 18(a)) that American Rare Metals was dormant and had never begun operations, although organized several years prior to the defendants' sale of capital stock therein, and that there was no market for said stock.

The evidence as to American Rare Metals showed Priestly H. Holmes bought $100.00 and his wife $500.00 for stock in said company, the sale having been made by appellant Myrick. Representations were made to the purchasers indicating the company was earning money and purchasers were told they "would get a per cent back in June." (R. p. 345) The testimony showed representations were fraudulently made. General counsel for said company testified that American Rare Metals had previously withdrawn its offer of stock to the public, that it had no assets other than title to some land in Arkansas, which had been levied upon for a tax lien. The company had no funds with which

(2) Point of error No. 5 alleges the Court erred in overruling appellant Bergman's motion for a Judgment of Acquittal as to Count Four of the indictment. This Court charges Bergman with transportation in interstate commerce from Carthage, Texas to Alexandria, Louisiana of a bank draft in the amount of $7,000.00, knowing the same to have been taken by fraud in violation of 18 U.S.C. § 2314.

Appellants insist the evidence does not show the draft was taken by fraud, nor that same was transported by Bergman as alleged. We cannot agree.

(3) In point of error No. 6 defendants contend the Court committed fundamental error in failing to set out in its charge to the jury the essential elements of the offense charged in Count Four of the indictment. The brief for appellant recites: "The Court in its charge to the jury failed to require a finding on the part of the

jury that the draft or check referred to in the indictment must be proven to be of the value of $5,000.00 or over."

It is true that 18 U.S.C., §2314 requires in part that the transportation in question must relate to securities "of the value of $5,000.00 or more." The Court in one portion of his charge (see Transcript, p. 879 and p. 880) stated as follows:

"Now that section just referred to provides in effect that it shall be unlawful for any person to transport or cause to be transported in interstate commerce any money of the value of $5,000.00 or more, knowing the same to have been taken by fraud."

In another portion of his charge to the jury (Transcript, p. 880) the Court in stating the essential elements required to be proven under Count Four, did not expressly state that the value of the security must be shown to equal $5,000.00.

The evidence in the case shows without dispute that the draft in question was in the sum of $7,000.00 and that it was of the value of $7,000.00 because it was paid. No reversible error is shown in the above Charge of the Court.

(4) In points of error No. 3 and No. 7 error is assigned upon the admission in evidence by the Court of photostatic copies of documents, primarily checks.

A subpoena was issued to the bank for production of these records and a bank official appeared, but instead of bringing the original microfilms of the checks he brought prints from the same which he identified as

having been made from the microfilms. Defense counsel objected to the admission of this evidence because as alleged, "under the best evidence rule that there has been no predicate laid." The Court overruled this objection but recessed court and suggested that defense counsel read § 1732 of Title 28 during the recess.

A reading of said section by counsel would have disclosed that the reproduction of such checks is,

> "... admissible in evidence if the original reproduction is in existence and available for inspection, under directions of the Court." See 28 U.S.C., § 1732(b).

See *Williamson, vs. United States*, 272 F.2d. 495, where this Court ruled,—

> "A photostat taken from permanent title records and properly identified by the proper custodian is admissible in evidence, it appearing the original records had been destroyed in ordinary course of business."

That case was cited by this Court with approval in the case of *Ahlstedt, v. United States*, 315 F.2d 62 (5 CCA), the latter case being distinguishable under its facts.

Had defense counsel made the slightest suggestion that the photostats offered in evidence were incorrect, or had he demanded production of the microfilms from which they were produced, it is apparent the trial judge would have taken appropriate action, but that was not done. Our ruling is based upon a matter of substance and not a finespun technicality. It is clear that pro

duction of the original microfilms, if insisted upon, would have been granted by the Court.

A careful study of the record in this case discloses that the evidence was sufficient to prove the guilt of appellants beyond a reasonable doubt and that no error of law appears requiring a reversal of the judgment. Therefore, the judgment of the trial court is AFFIRMED.

There are many rulings to the effect that,

> "a trial judge, in ruling on objections to evidence, should be fully apprised of the grounds of objection and given an opportunity to so direct the particular proceeding as to insure a fair trial to all." New Amsterdam Casualty Company vs. W. D. Foster & Co., (5 CCA) 214 F.2d 825(7)

That case also disposes of appellants' other points of error based on the admission in evidence of a list or summary of checks clearing through a bank and taken from microfilm records of the bank, as it appears the microfilm records involved were in court and available for inspection.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 19,950

H. M. (MIKE) MYRICK and VERNON EVANS BERGMAN, a/k/a Soll Evans, Sol Evans and Sonny Evans,
Appellants

-versus-

UNITED STATES OF AMERICA,
Appellee

Appeal from the United States District Court for the Eastern District of Texas

(February 19, 1964)

ON PETITION FOR REHEARING

Before HUTCHESON and GEWIN, Circuit Judges, and HOOPER, District Judge.

After due consideration it is ordered that the motion for a rehearing by appellants in the above stated case be, and the same hereby is, OVERRULED and DENIED.

J. C. Hutcheson
United States Circuit Judge

Wendell Gewin
United States Circuit Judge

Frank Hooper
United States District Judge

SUPREME COURT OF THE UNITED STATES

No. _____, October Term, 1964

VERNON EVANS BERGMAN, ETC., ET AL.,
Petitioners,

versus

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 19, 1964.

/s/ HUGO L. BLACK
Associate Justice of the Supreme Court of the United States.

Dated this 4th day of March, 1964.

APPENDIX C

TOHO BUSSAN KAISHA, LIMITED,
Plaintiff-Appellant,

v.

AMERICAN PRESIDENT LINES, LIMITED,
Defendant-Appellee.

No. 70, Docket 25151.

United States Court of Appeals
Second Circuit.

Argued Oct. 10, 1958.

Decided March 26, 1959

Before CLARK, Chief Judge, and MEDINA and LUMBARD, Circuit Judges.

LUMBARD, Circuit Judge.

This is an appeal from an order of the District Court for the Southern District of New York, by Dimock, J., dismissing plaintiff's action at the close of its case for failure to prove damages in an action for fraud and previous orders by

Walsh, J., denying plaintiff's applications for summary judgment.

The principal question is whether the plaintiff in this fraud action may recover the $74,438.30 it advanced in reliance on defendant's fraudulently issued bills of lading which represented that certain newsprint was on board its vessel on a certain date when in fact it was not, without proving that by so doing it had suffered any loss.

[1] Under the law of New York which governs this action, one who has been defrauded is entitled only to be indemnified for his injury and consequently may recover if he has already recouped his actual pecuniary loss from others. Further, the plaintiff has the burden of establishing that he suffered an actual loss. On this record we find that although plaintiff has been defrauded it has not shown that it suffered any loss. Accordingly we affirm the orders of the district court.

Plaintiff is a corporation organized under the laws of Japan. On October 20, 1951 plaintiff entered into a contract in New York with Trans-America Industries, Inc., to finance and arrange for the importation into Japan of 3,300 short tons of newsprint which, under simultaneously executed contracts, two other Japanese companies had agreed to purchase from Trans-America.

Plaintiff, as required by its contract with Trans-America, had established two irrevocable letters of credit through the Irving Trust Company in New York in favor of Trans-America. These letters provided for payment against certain documents including on board ocean bills of lading dated on or before January 31, 1952. Payment against bills of lading dated thereafter was to be made only if a letter of credit

establishing counter-credits in the amount of 2[illegible] of the credits opened by plaintiff were established in Japan by Trans-America in favor of the plaintiff. These counter-credits were to be drawn against by plaintiff in the event Trans-America failed to perform its contract. The letters of credit opened by plaintiff did not require that the newsprint shipped under the required bills of lading conform to the specifications of the underlying purchase contracts. In fact it is undisputed that the shipments did not conform to the contracts, the contracts were cancelled and much litigation has followed, all of which is immaterial to our disposition of this case.

On January 31, 1952, the last date bills could be negotiated against plaintiff's letters of credit without the opening of counter-credits by Trans-America, defendant's New York freight manager, at the request of Trans-America's freight forwarder, authorized the issuance of ten bills of lading certifying that certain newsprint was aboard defendant's vessel. In fact, as defendant's freight manager knew, the newsprint covered by the ten bills was not then aboard the ship but was still on the dock in New York. The falsely dated bills were subsequently presented with accompanying drafts totalling $74,438.30 by Trans-America and its assignee and they were honored by Irving Trust. In turn plaintiff was required to reimburse the Japanese banks which had requested Irving Trust to establish the letters of credit.

Plaintiff's basic position, both at trial and here, is that it is entitled to recover the $74,438.30 from defendant regardless of the amount of consideration it received from the sale of the newsprint or the amount of indemnification it recovered from Trans-America.

During plaintiff's case it was developed on cross-examination of Yasuhiro Ishii, an employee of plaintiff, that the newsprint covered by the ten bills of lading came into plaintiff's possession sometime after it reached Japan and that plaintiff sold it to various concerns. The plaintiff offered no admissible evidence as to the proceeds of these sales.

It was also established during the plaintiff's case that the plaintiff had secured a judgment against Trans-America and certain individuals in the New York courts relating to this shipment and others. The plaintiff offered no proof regarding the satisfaction of this judgment.

As the plaintiff failed to show that it had suffered any loss because of the fraudulently issued bills of lading Judge Dimock dismissed the complaint when the plaintiff had completed its proof.

Plaintiff maintains that defendant, as a tortfeasor, cannot avail itself of indemnification plaintiff has received from collateral sources. We do not agree.

[2] Since the misrepresentation in this case occurred in New York, a common law fraud action is governed by the law of New York. Klaxon Co. v. Stentor Electric Manufacturing Co., Inc., 1941, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477; M. Salimoff & Co. v. Standard Oil Co. of New York, 1933, 262 N.Y. 220, 186 N.E. 679, 89 A.L.R. 345.

[1] In its reply brief plaintiff states that it was awarded a judgment of $200,000 in the New York State courts against Trans-America, Inc. and certain of its officers. Counsel stated that the judgment was settled for $150,000 and that up to that time $80,000 of this settlement had been paid. Of course we have no information as to how much of this recovery could properly be considered to apply to the shipment covered by the ten bills of lading here involved. As we point out below this is one of the deficiencies in plaintiff's proof.

[3, 4] The New York decisions make it plain that the recovery allowable for fraud is not punitive in nature. The plaintiff is entitled to be indemnified only for actual pecuniary loss. Hanlon v. Macfadden Publications, 1951, 302 N.Y. 502, 511, 99 N.E.2d 546, 24 A.L.R.2d 733; Ross v. Preston, 1944, 292 N.Y. 433, 436, 55 N.E.2d 490; Sager v. Friedman, 1936, 270 N.Y. 472, 480-481, 1 N.E.2d 971; see also Reno v. Bull, 1919, 226 N.Y. 546, 553, 124 N.E. 144, (even possible profits may not be recovered). We therefore find no merit in plaintiff's principal contention.

[5] The next question raised by this appeal is who has the burden of establishing plaintiff's actual pecuniary loss. This question is also governed by the law of New York. Palmer v. Hoffman, 1943, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645; Sampson v. Channell, 1 Cir., 1940, 110 F.2d 754, 128 A.L.R. 394, certiorari denied 310 U.S. 650, 60 S.Ct. 1099, 84 L.Ed. 1415.

[6] Judge Dimock dismissed the plaintiff's action at the close of its case on the ground that it had failed to prove damages. We think Judge Dimock was correct. Under the law of New York plaintiff has the burden of establishing that the amount it paid out on the ten false bills exceeded any sum or sums which it may have received on account of this transaction. Merely proving that the money was paid out in reliance on false bills of lading is only part of the story. Sager v. Friedman, supra, 270 N.Y. at page 482, 1 N.E.2d at page 974; Deutsch v. Roy, 1st Dept. 1934, 239 App. Div. 714, 268 N.Y.S. 606, affirmed 1935, 269 N.Y. 508, 199 N.E. 510; Woolson v. Waite, 158 Misc. 764, 768, 286 N.Y.S. 619, affirmed 4th Dept. 1936, 247 App. Div. 855, 286 N.Y.S. 624. Here the record does not show that the plaintiff suffered any actual pecuniary loss.

Moreover, defendant, by cross-examination of plaintiff's witness, elicited both that plaintiff had sold the newsprint and that it had obtained a judgment against Trans-America with respect to the newsprint. But plaintiff never established the amount it received from the sale or whether its judgment had in whole or in part been satisfied, although obviously this information was in its possession.

Plaintiff contends, however, that it was unable to sustain its burden of proof because Judge Dimock erroneously excluded its offers of proof as to the extent of its actual loss. Specifically, plaintiff complains that Judge Dimock erred in excluding (1) the opinion testimony of plaintiff's witness, Yasuhiro Ishii, as to the value of the goods; (2) certain mill weight certificates identifying the newsprint shipped under the false bills and thus laying the foundation for expert testimony as to the value of the goods; (3) photostatic copies of plaintiff's books of account which apparently reflected the amount received from its sale of newsprint; and (4) the pre-trial deposition of Ishii.

[7] Judge Dimock excluded Mr. Ishii's opinion on the ground that his brief glance at the many rolls of newsprint as it lay on the dock in New York did not provide a sufficient opportunity for him to identify the nature and quality of the goods shipped under the false bills and thus his opinion as to the value of the goods was without foundation. While we doubt whether opinion testimony as to the value of the newsprint, even where proper foundation has been laid, would satisfy plaintiff's burden of showing its actual loss in view of its admission that the paper was sold in Japan, we need not rest our decision on this ground. We hold that Judge Dimock properly ruled that Ishii's brief examination of newsprint packed

and stored on New York docks did not provide a sufficient basis for him to express any opinion of the value of the newsprint.

[8] The mill certificates were excluded because plaintiff failed to produce someone from the mill to authenticate them. Judge Dimock properly ruled that the mill weight certificates could not be admitted unless so authenticated.

[9, 10] The photostats which plaintiff sought to introduce into evidence were copies of books of account kept in the ordinary course of business. The original books themselves would be admissible, but the photostats, prepared specially for the litigation, are not within either the federal or New York State business entry statutes. 28 U.S.C. §1732[2] (1952); New York Civil Practice Act, §§374-a,

[2] 28 U.S.C. §1732 provides:

"(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in the regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

"(b) If any business, institution, member of a profession or calling, or any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence or event, and in the regular course of business has caused any or all of the same to be recorded, copied or reproduced by any photographic, photostatic, microfilm, microcard, miniature photographic, or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless held in a custodial or fiduciary capacity or unless its preservation is required by law. Such reproduction, when

374-b, and therefore were properly excluded. The provisions of those acts permitting use of photostats refer only to situations where photostats, microfilms, or the like, have been made in the ordinary course of business and not in preparation for trial. No sufficient foundation was laid for their admission on this ground.

[11, 12] Plaintiff sought, however, to have the photostats admitted under § 344 of the New York Civil Practice Act, which provides that the specific statutory methods of proving the contents of documents shall not preclude proof according to the rules of the common law. Although § 344 is clearly applicable, by reason of Rule 43(a) Federal Rules of Civil Procedure, 28 U.S.C.A., it is plain that at common law the plaintiff is bound by the so-called "best evidence" rule to introduce the original books of account. There are, generally speaking, two exceptions to the application of this rule, whose underlying aim is, whenever reasonably possible, to allow the opponent to examine the documentary original. 4 Wigmore § 1192. The first arises if the original document is unavailable for production in court. If, for example, the original is in the

---

(1) satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not and an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduction or an enlargement or facsimile does not preclude admission of the original. This subsection shall not be construed to exclude from evidence any document or copy thereof which is otherwise admissible under the rules of evidence."

The New York Business Record statute is substantially identical with the federal statute quoted above in footnote 2 at least in so far as it is relevant here.

hands of a third party who will not voluntarily surrender it and who is not subject to the court's process, or if it has been lost or destroyed without the connivance of the proponent, then a properly authenticated copy will suffice. 4 Wigmore §§ 1193-1198; 1211-1218. In this case, however, these books were in plaintiff's possession, and no reason was offered why plaintiff could not have made the original books available. Moreover plaintiff's own witness testified that the original books were separately kept for the newsprint transaction which indicates that they could have been produced at trial without disruption to the plaintiff's business. Lest it nevertheless be thought that this is an overly technical application of the rule, we note that plaintiff did not request that this non-jury action be continued to permit him time to secure the necessary documents.

The second exception to the application of the rule is for so called duplicate originals. 4 Wigmore §§ 1232-1240. These are documents which, because of the nature and time of their production are in every regard indistinguishable from each other. Examples of such documents are carbons and the typed originals. United States v. Manton, 2 Cir., 1939, 107 F.2d 834, 845; McCormick: Evidence (1954) at 421. Photostats made at some later time are not duplicate originals. While they are frequently substituted by consent of the parties where the original is available, that is quite another matter from receiving them, over objection, where the original is in Japan and no reason is given for not producing it. How could there be any guarantee that they are accurate reproductions of all that may be relevant? Here the plaintiff has never attempted to answer that question.

We are fully mindful of the discussion in United States v. Manton, supra, 107 F.2d at page 845. There Justice Sutherland in commenting on the admissibility of photostatic reproductions of checks by a recordak machine made by a bank in the regular course of business said:

> "And if it appear, as it does here, that what is called secondary evidence is clearly equal in probative value to what is called the primary proof, and that fraud or imposition, reasonably, is not to be feared, the reason upon which the best evidence rule rests ceases, with the consequence that in that situation the rule itself must cease to be applicable, in consonance with the well established maxim—cessante ratione legis, cessat ipsa lex.
>
> "An over-technical and strained application of the best evidence rule serves only to hamper the inquiry without at all advancing the cause of truth."

We fully endorse the position there taken. But in cases such as this there are dangers of "fraud" and "imposition" in the use of photostats prepared specifically for trial and not made in the regular course of business. The Trial Judge, recognizing these dangers, properly refused to admit the photostats in the exercise of his discretion. We cannot now say that this discretion was abused.

[13, 14] Finally, plaintiff sought to introduce the pre-trial deposition of Mr. Ishii, which was taken at the instance of defendant, on the ground that defendant's introduction into evidence of part of that deposition entitled plaintiff to introduce the balance. The deposition included certain extracts from plaintiff's records which reflected the amount plaintiff received from the sale of the newsprint.

The extracts were specially prepared for the litigation. Judge Dimock excluded plaintiff's offer of the entire deposition after defendant, at the court's suggestion, withdrew the part which it had already read into the record. This case was tried before Judge Dimock without a jury and his determination to allow the defendant to withdraw the deposition was within the proper exercise of his discretion. In any event, had the part of the deposition offered by defendant remained in evidence, defendant could still have objected to the admission of the extracts incorporated in the deposition.

The net result is that although the plaintiff had recovered some monies against its payment of $74,438.30, it did not offer competent proof of what was realized from the paper and it chose to offer no proof whatsoever of any recovery from Trans-America on its judgment secured in the New York Courts.

If the plaintiff chose not to produce the original books it was not without means of producing admissible evidence of the proceeds from the sale of the paper. One of the plaintiff's officers with knowledge of the facts could have testified, or a commission could have issued to take such testimony or the testimony of the purchaser or purchasers. As it was the plaintiff had taken no steps to insure that proper proof regarding the sale of the paper would be available for the trial, and it did not ask for additional time to produce witnesses with knowledge of the facts.

[15] Our holding that it was incumbent on the plaintiff to prove its loss, if any, disposes of the appellant's appeal from the orders denying its motions for summary judgment. Obviously the matter of loss had to await proof

at the trial. Judge Walsh correctly denied summary judgment and we affirm his orders. D.C. S.D.N.Y. 1957, 155 F. Supp. 886.

The disposition of the appeal makes it unnecessary to pass on the other defenses raised by the appellee that the plaintiff's losses, if any, were not due to the fraudulent issuance of the bills of lading, that the complaint failed to state a cause of action under the Federal Bills of Lading Act, 39 Stat. 538-545 (1916), 49 U.S.C.A. §§81-124 and that the action was time-barred under §3 of the Carriage of Goods by Sea Act, 49 Stat. 1208 (1936), 46 U.S.C.A. §1303.

Accordingly, the orders of the District Court for the Southern District of New York denying plaintiff's motions for summary judgment and dismissing plaintiff's action at the close of its case are affirmed.

CLARK, Chief Judge (dissenting).

As the opinion in substance concedes, we have reached a highly anomalous result through resort to the most technical of legal rulings. Defendant concededly committed a wrong in issuing false bills of lading; the fact that it may have felt compelled to its course by the exigencies of business competition does not lessen its responsibility to plaintiff, which clearly suffered loss. True, the amount of the loss was never fixed; and here plaintiff's counsel must bear some responsibility for the contretemps. For he stuck rigidly to his conception of the law that the burden of proof was on the defendant, even after the court had ruled otherwise. But I do not believe it a cardinal sin that a lawyer, faced with trial exigencies accentuated by an unsympathetic judge, fails to make a quick mental adjustment involving a

shift of legal position. Further it is not our practice to penalize a client throughout both trial and appeal for tactical errors of his counsel. Here to sustain the result we are turning back the use of ordinary business practices in court in rejecting photostat copies of books of account duly verified by the testimony of a live witness. And so an inequitable decision is upheld by an evidence ruling out of keeping with modern business life.

Although perhaps we might be able to compute the damage, I think it entirely proper to remand this case for further proceedings below, particularly as certain defenses of illegality were never reached. But elementary considerations of fairness and equity require at least a remand, and not a final judgment for the defaulting defendant. And if there is any question as to the authenticity of the photostats—none is really indicated—it can be settled with exactitude and justice on such remand. It is to be noted that the trial judge rejected the photostats not in the exercise of some "discretion" as to their falsity, as the opinion suggests, but because he held copies inadmissible—a decision erroneous according to modern standards, as the opinion concedes. I would reverse and remand.